Prisoner's Dilemma: Disenfranchisement, Rights Forfeiture Theory, and Race

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Abstract

In forty eight out of fifty states in America, prisoners are denied the right to vote. My aim in writing this paper is to determine whether rights forfeiture, as a theory of punishment, can adequately account for the normalized state of prisoner disenfranchisement in the United States. To answer this, I will be analyzing the works of rights forfeiture scholars, first to measure whether their core principle successfully justifies the seizure of suffrage as permissible punishment for criminal behavior, and then to compare those results with the present condition of voting rights. I argue that rights forfeiture cannot justify prisoner disenfranchisement normatively nor empirically, and that all theories of punishment must take into account the social context in which they were created in order to have any sort of explanatory power. I claim that one influential aspect of our country's social context in regard to punishment is its history of racial disenfranchisement. If we do not acknowledge how race and criminality have been intertwined in American society, we will never be able to understand why theories of punishment fall short in their application, nor will we be able to recognize the extent that the exclusion of marginalized racial groups from political power has been perpetuated through the criminal justice system.

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Rights forfeiture, as a theory of punishment, claims that it can adequately account for the normalized state of prisoner disenfranchisement in the United States. However, I argue that rights forfeiture theory fails to justify prisoner disenfranchisement, as it was formulated to rationalize the surrender of personal and civil liberties, and is therefore ill-equipped to properly handle the political right to vote. Furthermore, when scholars do address voting rights in theory, the amount of consideration they afford to the issue is directly at odds with the present proportion of disenfranchised prisoners in the United States. This divide indicates that there is something missing in right forfeiture's model that would answer for the difference. A theory of punishment, detached from the political reality from which it is meant to be applied, may be insufficient in translating its tenets from theory to reality. In this case, I suggest that one aspect of our political reality is the history of racial disenfranchisement in the United States. To understand what rights we maintain or lose in the justice system, and why some theories of punishment are lacking in their explanatory function, we must acknowledge how race and criminality have been intertwined in American society, to the extent that the exclusion of marginalized racial groups from political power has been built into the system.

The saying "one person, one vote," though originally declared in the context of electoral districts, has come to embody the democratic ideal that every American citizen has an equal say in the direction that their country is going. However, this beloved maxim has been proven false, in that there exists a significant part of the population excised from the ballot with limited public backlash. They are the current inmates at

prisons, whose disenfranchisement, even more so than those that have served their time and have re-entered society, goes largely unquestioned, with Main and Vermont being the only two states in the nation granting prisoners the right to vote.

Before we begin, I find it necessary to clearly differentiate between what I refer to as "prisoner disenfranchisement" and what is more commonly recognized as "felon disenfranchisement." Prisoner disenfranchisement refers to how the vast majority of inmates currently in American prisons are banned from voting. This concept is more specific than the broader issue of whether or not former felons, who have been released on parole or probation, or have fully served their sentence and have reintegrated into society, should be allowed to vote. This latter issue is known as felon disenfranchisement. Although in public discourse, felon disenfranchisement is discussed as an umbrella term, under which prisoner disenfranchisement is often grouped into, within the scope of my argument prisoner disenfranchisement should be understood as separate from felon disenfranchisement, as they are treated differently by society and rights forfeiture theory.

The first step in trying to comprehend the phenomenon of prisoner disenfranchisement is to determine whether it can be normatively justified by rights forfeiture theory. To put it in slightly different terms, does rights forfeiture theory offer a convincing explanation why prisoners should not have the right to vote? Rights forfeiture is a theory of punishment, meaning that at its foundations, it seeks to explain how and why we discipline those that transgress society's standards. Its specialized language of "rights" sets rights forfeiture apart from competing models like retribution, which takes a general "eye for an eye" approach, because it provides the particular

mechanism through which criminals can be punished and is the key to explaining why state punishment is permissible. But what exactly makes punishment permissible? When is it allowed? In his revitalization of rights forfeiture, philosopher Christopher Heath Wellman (2012) answered these questions by emphasizing how a theory of punishment, regardless of its objectives, is only permissible if it "violate[s] no one's rights" (p. 372). Wellman asserted that no such violation takes place under the framework of rights forfeiture, because in the process of committing a crime and inflicting harm unto someone else, criminals have chosen to surrender the right to govern themselves (p. 373). They do not endure the restricted freedoms that come along with incarceration unfairly, because they have forfeited the right not to have their freedoms restricted from the state. As voting is such a right seized by the state upon becoming a prisoner, rights forfeiture's approach makes it the ideal lens through which we can assess the normative legitimacy of prisoner disenfranchisement.

Yet, the types of rights Wellman and other political theorists regularly refer to in the context of rights forfeiture contrast against society's understanding of voting rights, putting prisoner disenfranchisement's legitimacy in doubt. In a vague manner, Wellman defined the rights being forfeited as "life, liberty, and/or property rights" and "rights against hard treatment" (p. 373, 374). More specifically, he described the rigid structure of incarcerated life, such as the limitations placed on how a prisoner is allowed to dress, how they choose to structure their time and activities, what level of privacy they can expect, and where they are able to go. These types of rights are known as personal liberties or, when formally protected by law, civil liberties. In other words, if an individual has not harmed someone else by committing a

crime, personal and civil liberties dictate that the individual should be able to act and associate freely without any arbitrary restrictions.

In fact, the entire structure that rights forfeiture theorists use to depict why inmates are not guaranteed these rights in prison is highly individualized, focusing only on the criminal, the harm they have done, and the rights they cede. Wellman went so far as to isolate the effect of surrendering rights by saying that "one forfeits the privileged position of dominion over one's *self-regarding* [emphasis added] affairs" (p. 373). Rights forfeiture was designed to justify the denial of personal and civil liberties that are only supposed to affect the individual that performed the crime.

However, voting rights are political in nature, and inherently differ from personal and civil liberties. Political rights are the means by which citizens can participate in deciding the direction of their country, its policies and principles. In a democratic republic like the United States, the most direct way to do this is by voting for local, state, and national politicians that will keep their constituents' views in mind when they formulate laws. People make decisions on who to vote for based on not only what will most benefit them as individuals, but on what is best for their neighborhoods, identity groups, and entire nation. With this understanding of how people choose to vote, I believe that enfranchisement can hardly be considered "self-regarding" and does not fit into the same category as personal and civil liberties. Depriving one person of their right to vote necessarily requires depriving the communities they belong to of a full representative voice. When taking this consequence in consideration, prisoner disenfranchisement, within the framework of rights forfeiture, unjustly punishes more people than just the prisoner that committed the crime, an outcome that contradicts

rights forfeitures' emphasis on individualized penalties and its conception of permissibility.

The disproportionality of prisoner disenfranchisement as a punishment, and how rights forfeiture theory fails to justify it, becomes even more apparent when we take into account what kinds of crime lead to its revocation. Within the field of rights forfeiture, there is disagreement on whether the surrendered rights have to be "symmetrical" to the harm inflicted. In other words, the nature of the punishment has to match the nature of the crime. While Wellman rejects this premise, in his evaluation and critique of rights forfeiture theory political philosopher Brian Rosebury (2015) enforced the idea that "*this* unpleasant experience caused by X to Y gives us a reason to impose *that* unpleasant experience on X" is necessary in order to rationalize the forfeiture of rights (p. 261). "*This*" and "*that*" must be logically connected, or else the punishment would be arbitrary and would negatively influence the theory's legitimacy. A theory that lets punishment come in any form, regardless of the crime, does not sound like a fair theory. If we accept Rosebury's statement as true, then within the context of prisoner disenfranchisement, a criminal would have to infringe on somebody else's political right in order for their own political right to be taken away. More specifically, the only reason a prisoner could be disenfranchised would be if they committed an election-based crime, such as damaging a polling machine or sabotaging paper ballots. Under this stipulation of symmetry, rights forfeiture would very rarely apply the penalty of disenfranchisement to a prisoner.

However, even if we discard such a rigid stance on crime and punishment, proportionality still poses a problem for rights forfeiture in a different way. Rights forfeiture aims for proportionality in the duration

and severity of a sentence relative to its crime. Once again, in order for a punishment to be fair, it must match the harm the crime caused in how long the punishment lasts and how harsh it is on the criminal. Let us consider one felony that can lead to disenfranchisement: theft. When someone steals another person's possession with the intention of depriving that person of their property, and that possession is worth more a certain monetary threshold as determined by state law, it is considered a felony (Theoharis, n.d., para. 6). Can theft, a breach of property rights, be equated with a political right like voting that, as stated above, has the potential to affect a wide range of people? In our example, as with many other felonies, including disenfranchisement in the punishment comes off as overly severe. Wellman brushed this conflict aside with the claim that all theories of punishment have difficulties striking a fair balance, but this does not excuse rights forfeiture's responsibility to endeavor for the most equal outcomes that it can possibly obtain (p. 387). Just because other theories of punishment share the same flaw, it does not make the act of having that flaw acceptable, only unfortunately common. The lack of set proportionality may not be the sole reason on which we would reject rights forfeiture's permissibility, but the disparity between crime and punishment seems especially alarming when voting rights are at risk due to their significance within American society.

The extent to which prisoner disenfranchisement is perceived as an unfair punishment for a crime, and thus erodes rights forfeiture's normative clout, depends on how highly our society regards voting rights. As voting is often viewed as the cornerstone of democracy, it is not a matter of whether voting rights are deemed important, but how important, and what assumptions we make concerning those who have

suffrage, versus those who do not. The question at the heart of all this is: does citizenship necessarily entail suffrage? Are all those that are disenfranchised, such as prisoners, full citizens of the United States? In his exploration of penal disenfranchisement, philosopher Christopher Bennett (2016) identified four functions of voting, with the last one concerning citizenship status. He stated that voting acknowledges "the person's right to govern [their] own life as important to the degree that, as Rousseau would have it, only a law in the formulation of which [they have] an equal say is fit to govern [them]," a standing that they enjoy with their fellow citizens (p. 412). In essence, voting is important because it represents a society's power to decide its own rules. However, Bennett went on to contend that there are other routes to fulfill the functions of voting, other forms of political participation, so that the right to vote is itself unnecessary for complete citizenship. To him, you can be denied the right to vote and still be considered a citizen.

While it is important to acknowledge that voting is not the only method in which we can enact political change, it is my opinion that suffrage is such a fundamental indicator by which we have evaluated equality in this country that it is a required and essential sign of citizenship, where retracting it is an unacceptable altering of status. The label of "second-class citizen," referring to a person deprived of the full set of political rights, acknowledges that person is a citizen in name only. In actuality, they are both treated unequally by the state and cannot effect change through the same channels as "first-class citizens," meaning that they compose an entirely separate and inferior status group (historically, and relevant to my discussion of race later on in this paper, "second-class citizens" has been used to describe African Americans during the Jim Crow era due to their deprivation of rights). Political scientists Saul

Brenner and Nicholas J. Caste (2003) also subscribe to this point of view, citing influential philosopher John Stuart Mill and Supreme Court Justice Thurgood Marshall in their defense that "a democracy in which no citizens are accorded the vote is self-contradictory" (p. 228). Even if a society had other ways in which its inhabitants could politically express themselves, it could not be considered a democracy that entirely protected the rights of its citizens without that direct channel of political participation. It is the only direct method in which citizens can hold their government accountable, and lacking that, they are only "second-class citizens," mere subjects to the state. However, losing your personal or civil rights does not result in the same, drastic status change. In this sense, voting rights (and their understanding as symbols of citizenship) surpass the types of liberties rights forfeiture was formulated to justify, and prisoner disenfranchisement is an unsuitable punishment in its framework.

On the rare occasions that rights forfeiture theorists have openly addressed prisoner disenfranchisement, there has been disagreement on how often it should be applied, but more importantly, the theorists overall have demonstrated a great amount of respect towards voting rights. None of the scholars I evaluated believe that felon disenfranchisement should extend beyond a felon's sentence, and none of them claim that prisoner disenfranchisement should be employed unilaterally across all types of crimes. As voting rights are so significant, some reasoned that prisoner disenfranchisement should only be used for the most serious of crimes that threaten a person's status as a continuing member of society (such as arson, rape, or murder), and can even be used as a civics lesson to raise a prisoner's sense of collective responsibility (Bennett, 2016, p. 423; Sigler, 2014, p. 1741). Political scientists and professor at Brown

University Corey Brettschneider (2007) also stressed moderation, although he is slightly more pragmatic in his approach to balancing prisoners' rights as citizens and preventing them from exhibiting too much political influence for personal gain. Recognizing the greater influence citizens have at the local level of politics, Brettschneider recommended that prisoners be allowed to vote in national elections, but revoke the right when choosing local officials like a sheriff that could influence the prison's safety (p. 190). The high respect and caution in limiting voting rights continues with Brenner and Caste (2003). As previously stated, they believed that the right to vote is an essential aspect of democracies, and because of this conviction, they advocated that suffrage should not only be extended to current inmates, but that prisoners should be required to vote as part of their reintegration into society, which would benefit them individual and the population at large (p. 241). Even though their exact suggestions for how often and in which circumstances prisoner disenfranchisement should be used as a punishment have varied, rights forfeiture theorists have taken the prospect of revoking voting rights incredibly seriously.

Given that so many rights forfeiture scholars believe that prisoner disenfranchisement should be applied precisely and sparingly at most, if rights forfeiture theory has any explanatory power, then we should expect that most prisoners should have the right to vote. However, this is almost the exact opposite of the present state of prisoner disenfranchisement in this nation. Out of all of the United States, only Maine and Vermont have no restrictions on allowing their prisoners to vote, making up a miniscule proportion of the total prisoner population. Furthermore, public opinion polls suggest that this is unlikely to change in the near future. In their survey on attitudes towards felon

disenfranchisement, sociologist Jeff Manza and colleagues (2004) found that only thirty one percent of their target group supported reinstating voting rights for prisoners, a drastic divide from the sixty percent that supported reinstating voting rights for probationers and parolees, even though prisoners, probationers, and parolees are all groups that have not fully completed their sentences (p. 280). The empirical condition of the proportion of prisoners barred from voting, in combination with the perspective of the public that prisoners should remain disenfranchised, contrast against Brettschneider's professed goal as a theorist of "limiting cruel and unusual punishments and preserving democratic rights to the greatest extent possible" (p. 190). Even when rights forfeiture scholars felt the need to place limitations on prisoners, they would still vastly expand the franchise more than the public and legislators have allowed, meaning that rights forfeiture cannot properly explain how prisoner disenfranchisement has manifested in reality.

To review what we have covered so far, rights forfeiture cannot normatively justify prisoner disenfranchisement, as it was founded to defend the loss of personal and civil liberties, not political rights. Nor can rights forfeiture account for the rigid ban on prisoner suffrage present throughout nearly the entire nation, based on the theorists' respect for voting rights. These failures of rights forfeiture indicate that there is a crucial element missing from its framework that is necessary for understanding the current state of voting rights in America. So, what is capable of bridging the gap between theory and reality?

Although there may be other factors that can contribute to an answer, the explanation that I believe most comprehensively addresses the flaws in rights forfeiture is related to race. Let us consider some statistics on incarceration and disenfranchisement. Based on publications

from the Department of Justice and data from state departments of corrections, sociologist Christopher Uggen and colleagues (2016) estimated disenfranchisement rates for 2016. Their report, sponsored by The Sentencing Project, a nonprofit organization that advocates for criminal justice reform, approximated that there are over 1.3 million prisoners disenfranchised in the United States. Furthermore, of those disenfranchised prisoners, a staggering forty two percent are African Americans (Uggen, Larson, & Shannon, 2016, p. 16). As African Americans make up only thirteen percent of the entire United States population, it is clear that prisoner disenfranchisement laws have had a disproportionate impact on black citizens.

This disparity reflects two important issues that the public needs to understand about the history of race in this country. First, excessively high rates of black disenfranchisement compared to white disenfranchisement are not new, nor unique to the prisoner population. The United States has an enduring history of politically alienating African Americans and blocking them from accessing the ballot through strategies as varied as literacy tests, poll taxes, grandfather clauses, white primaries, voter I.D. laws, and felon and prisoner disenfranchisement. While these first four voter suppression methods have been ruled expressly unconstitutional, the latter two persist into the present day and still disproportionately affect black citizens. Alabama's prisoner disenfranchisement law is an example of one such policy. The law prevents any persons convicted of a crime involving "moral turpitude" from voting, a phrase which has never been formally defined, and whose interpretation is usually left up to the discretion of local registrars. Upon investigating the Alabama law's origin and current consequences, Campbell Robertson (2016) of the *New York Times* found that it was

passed with the intention "to establish white supremacy in this state," in the words of 1901 Constitutional Convention president (para. 11). After the collapse of Reconstruction, Alabama used the ambiguous phrasing of "moral turpitude" to explicitly target black voters and prevent them from exhibiting any of their emerging political influence. Even though the unabashedly racist decree would be struck down by the Supreme Court in 1985, Robertson reported that the Alabama legislature ten years later reinstated the moral turpitude clause to selectively apply to felonies (para. 12). The moral turpitude clause continues to have a racially biased effect, as African Americans make up fifty eight percent of Alabama's disenfranchised prisoner population, but only twenty seven percent of the overall state population (Uggen et al., 2016, p. 16). With such a high proportion of black citizens removed from the political process and unable to have an equal say in the future of their communities because of prisoner disenfranchisement laws, the label "second-class citizens" from the time of literacy tests and poll taxes remains relevant to this day.

The second issue that the public needs to understand is that prisoner disenfranchisement does not exist independently of other criminal justice policies. There is a consensus among academics specializing in African American affairs that the high amount of blacks deprived of the right to vote is a result of regulations that overall increase the number of African Americans entangled in the criminal justice system (Mauer, 2002; Ochs, 2006; Brown-Dean, 2007; Feinberg, 2011; Gray, 2014). These policies marked the execution of the War on Drugs, and one academic, sociologist Khalilah L. Brown-Dean (2007), explained how the "adoption of mandatory-minimum sentences, the abolishment of parole in many states, and the adoption of differential sentencing plans for certain crimes" contributed to the rise in black disenfranchisement (p.

110). The new laws often had a racial dimension in content and implementation. For instance, Congress enacted much harsher penalties for crack cocaine versus powder cocaine (known as the 100:1 disparity in sentence length), which was associated more with African American communities, and police forces arrested greater numbers of blacks for the use and possession of marijuana, despite comparable rates by whites. By setting minimum prison lengths that could not be lowered even with extenuating circumstances, and by preventing prisoners from applying for early release, the black prison population swelled. More people are incarcerated for longer periods of time, meaning that they are also disenfranchised for longer periods of time. But looking at incarceration rates and disenfranchisement rates by race alone, without any context of what led to them, we would have no idea that there are greater forces at play.

The combination of the history of disenfranchisement laws and how criminal justice policies interact with each other to disproportionately affect African Americans demonstrate the dominance of structural racism in American society. The maintenance of racial differences takes place not through individual actions, but through the systematic preference of white people over all other races, as evident in the wide array of unequal outcomes blacks face in the criminal justice system. Worse yet, these outcomes have become normalized, and society rarely questions the set of laws, institutions, and cultural standards that enforce them. Society views the disproportionate incarceration and disenfranchisement rates of African Americans as confirmation of individual fault, not as the end result of decades of policy that functions to keep whites at the pinnacle of political power. After all, who else benefits from disenfranchising major portions of the black population? In

order to understand why prisoner disenfranchisement is still so prevalent, we have to consider how structural racism functions in the United States. However, rights forfeiture theory fails to do so, and thus it insufficiently justifies prisoner disenfranchisement because it follows the same trend of ignoring the political reality of race in America in pursuit of a normative ideal.

Rights forfeiture may not be alone in its inability to properly justify prisoner disenfranchisement or why punishment is considered permissible. Any theory of punishment that fails to consider the context in which it was created will not only fall short in its explanatory abilities, but may reinforce oppressions built into the system. In her defense of prisoner disenfranchisement's use in a modern liberal democracy, law scholar Mary Sigler (2014) declared that she will not be considering the racial dimension of prisoner disenfranchisement, saying, "it may turn out that intolerable racial consequences doom the practice in any event, but my present aim is to explore the possibility of a compelling and principled case for disenfranchisement" (p. 1728). It is very likely doomed, for prisoner disenfranchisement does not exist in a vacuum, and theories divorced from their social context will only reinforce power hierarchies without any pre-emptive measures to combat racial inequality in place. Even race-neutral laws with the best intentions can have devastating, racially disproportionate outcomes, and it is a naïve worldview that thinks that theory can be effective when separated from reality. An unwillingness to grapple with race results in rights forfeiture, which perceives the fundamental rights being deprived from a prisoner as personal and civil, but not political, and cannot explain why a disproportionately black population of prisoners are still being barred from voting. Even more significantly, it also means that academics and the

rest of the public alike do not know how to change our perceptions on prisoners, how to recognize what rights should go along with their citizenship, and why we should amend the law so that all citizens can engage with the country's political process. Until we can rethink the relationship between theory and reality, significant portions of the American populace will continue to be treated as inferior and prevented from having an equal say in the future of our nation.

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Research Strategies Reflection

American University's library resources were essential for my research paper, and from the very start I used them to formulate and narrow down my paper's point of view. My goal in researching voting rights for current inmates in the United States was to survey academic approaches regarding a personal belief. My opinion heading into the research process was that all Americans, irrespective of incarceration status, should have the right to participate in the democratic system by selecting their local, state, and national representatives and to express their citizenship, but how does this stance relate to the scholarly work of political theorists? Furthermore, the fact that only two states out of the entire country allow current inmates to vote without restrictions indicates that my opinion is not popular in practice, whether it be with legislators or constituents. Seeking to develop a more nuanced understanding of prisoner disenfranchisement and why it is so prevalent, I began my research by brainstorming subject topics and decided to analyze theories of punishment that attempt to justify prisoner disenfranchisement. I did a basic search on SearchBox connecting theories of punishment and voting rights, with the most promising options being the retribution, social contract, and rights forfeiture models. After skimming through several articles from each theory, I decided to use rights forfeiture as it directly addresses the revocation of rights as a result of criminal activity. In addition, SearchBox produced more results on rights forfeiture that explicitly referenced prisoner disenfranchisement in the way that I defined it in my paper, as opposed to the articles about retribution and social contract theory that had a broader treatment on voting rights. Having these specific search results meant that I would not have to extrapolate as much from the normative

to the empirical, and that I could make precise criticisms of the theory of punishment without the risk of misinterpreting general principles.

For the process of determining the exact sources I would use in my paper, I moved to the Wal-Mart and subject databases accessible through American University's library. Considering that the project's assignment required that sources were to be limited to scholarly articles, along with supplemental articles from popular media outlets that also passed the C.R.A.A.P. test, I was able to use databases like ProQuest Central that feature academic periodicals and can filter out irrelevant results. Part of the strength of my sources' content is that they were published relatively recently and are particular to the state of voting rights in America, two fields that I could control through ProQuest's search settings. HeinOnline Law Journal Library was especially useful in locating articles about the foundations of rights forfeiture. I found that the "rights" to which rights forfeiture most commonly refers to are civil and personal liberties, which vary from the political liberty of voting. To me, this difference had the potential to be significant in uncovering assumptions underneath when rights forfeiture believes punishment to be permissible, so I returned to the original keywords of prisoner disenfranchisement and redesigned the focus of my research to be on the basic concepts of rights and citizenship. Truthfully, I struggled with these concepts, as there was a lack of consensus by the authors I read on the full implications of denying the right to vote to current inmates within rights forfeiture literature. However, in my writing I used this disagreement as further evidence in and of itself that rights forfeiture may not be enough to explain the state of prisoner disenfranchisement in our country.

Later on, I revisited HeinOnline throughout the revision process, as it also offers articles from legal publications that specialize in the

intersection of race and the law, which provided me with the groundwork for analyzing the reality of prisoner disenfranchisement. By becoming more detailed with my keywords and combinations of Boolean operators, I could find new sources that built on what I had already included in my paper. Moreover, I drew on the bibliographies of my pre-existing sources to find thematically related articles that expanded on areas of interest within rights forfeiture theory and voting rights. I removed sources that contributed less to my argument and replaced them with others that were more effective in making my point.